IN THE

United States Supreme Court

October Term, [redacted] 1922

No. [redacted] 110

SOUTHERN POWER COMPANY,
Petitioner,

against

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO AND CITY OF HIGH POINT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN W. DAVIS,
KING, SAPP & KING,
AUBREY L. BROOKS,
Attorneys for Respondent, North Carolina Public Service Company.

C. A. HINES,
Attorney for Respondent, City of Greensboro.

DREW PEACOCK,
Attorney for Respondent, City of High Point.

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SOUTHERN POWER COMPANY, *Petitioner,* *against* NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO and CITY OF HIGH POINT, *Respondents.*	No. 554

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The essential facts as well as the law of this case lie within short compass.

The petitioner, Southern Power Company, was chartered under the laws of the State of New Jersey with power *inter alia* to generate electricity for light and power and transmit the same to consumers on its lines or "to independent venders thereof" (R., p. 364). It domesticated itself in North Carolina as a public service corporation and thereby became under the laws of that State possessed of the right of eminent domain and charged with corresponding duties.

Prior to this litigation, it had for a number of years voluntarily engaged on a broad scale in the business of selling electric current to independent venders as permitted by its charter, and was actually selling electricity at wholesale to numerous local distributing companies, manufacturing concerns and municipal corporations who, in turn, delivered it to the ultimate consumer. Among the distributing companies other than the respondent who were enjoying this service were the Leaksville Light

& Power Company, Norwood Power & Light Company, Hillsboro Power & Lighting Company, Piedmont Railway & Electric Company, Lancaster Light & Power Company, and, in addition, the Southern Public Utilities Company, an affiliate of the petitioner, which, like the others named, purchased from it electricity at wholesale and retailed it in a large number of North Carolina towns and cities.

In the production of electric current by water-power, the Southern Power Company enjoys a practical monopoly in the Piedmont region of North Carolina. The sale of this current to independent venders like the respondent constitutes not its casual, but its current business. In the language of the petitioner's Vice President (R., p. 169):

> "We do not retail current in the sense of supplying lighting customers in any incorporated town in North and South Carolina except Salisbury."

In this situation, the Southern Power Company attempted, first, arbitrarily to impose on the respondent North Carolina Public Service Company, whom it had long been serving, rates in excess of those which it was charging to like customers under similar circumstances and conditions, and, finally, to deprive it of all service whatever.

As stated in the opinion of the Circuit Court of Appeals, its claim was nothing less than that it

> "owes no public service 'of transmission of current to independent vendors thereof'; that as to such service it is not subject to rules and regulations of the State Corporation Commission; that it may furnish one or many of these independent vendors to cities and towns to the exclusion of others; that it may refuse to furnish current on any terms to cities and towns themselves to be resold to their inhabitants; that it has absolute freedom of contract to discriminate in price and terms between all independent vendors, including cities and

> towns; that it has the right to create its own subordinate 'independent vendor', Southern Public Utilities Company, and refuse to deal with any other on equal terms or on any terms."

In denying this claim, the Circuit Court of Appeals announced the governing principle of law as follows:

> "But when a corporation has definitely undertaken and entered upon a particular service authorized by a charter which confers the right of eminent domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by public authority and it must serve all alike. In such public service it cannot pick and choose its customers."

It is submitted that the writ now prayed should be refused for the following reasons:

I.

The decision of the Circuit Court of Appeals is in accord with the uniform current of authority in this and other courts. *New Orleans Gas Co.* v. *Louisiana Light Company,* 115 U. S., 650; *Western Union Telegraph Company* v. *Public Service Commission,* 230 N. Y., 95; *New York & Queens Gas Company* v. *McCall,* 245 U. S., 345.

It is in precise accord with the conclusions already reached by the Supreme Court of the State of North Carolina in litigation involving the same question and these same parties. *Salisbury & Spencer Railway Company* v. *Southern Power Co.,* 101 S. E., 593, 102 S. E., 625, 105 S. E., 28; and *North Carolina Public Service Company* v. *Southern Power Company,* 179 N. C., 330; 107 S. E., 226.

II.

A question so well settled will not be regarded as any longer one of public importance within the rules of this Court governing the allowance of a writ of certiorari.

III.

Where a public service corporation like the petitioner has voluntarily engaged in a class of business permitted by its charter, it must be held to have dedicated its property to that extent to the public use. It cannot escape the consequence of such dedication by entering into individual contracts with each consumer. Otherwise, by the mere process of making discriminatory contracts it could free itself from the obligation which the law imposes not to discriminate.

IV.

The claim that the North Carolina Public Service Company is a competitor of the Southern Power Company and as such not entitled to demand its service, is wholly unsupported by the facts. The question must be determined by looking not to the enumerated but unexercised powers in the charter of the North Carolina Public Service Company, but to the business in which it actually is engaged, which is selling light and power in the cities of Greensboro and High Point alone. In these cities the Southern Power Company has not and never has had a franchise, and is unable to do any business whatsoever. The action of the North Carolina Public Service Company in extending its lines to certain enterprises on the outskirts of these two cities is shown by the record to have been encouraged and assented to by the Southern Power Company (R., pp. 423-433). There is no competition whatever between the two corporations.

The Southern Power Company for several years denied all right of the State Corporation Commission of North Carolina to regulate its rate for current to any and all consumers. The North Carolina Public Service Company, by previous litigation in the State courts, forced the Southern Power Company to submit itself

to State regulation. Its rates being thus subject to State control, it can no longer have any reason for denying service to the North Carolina Public Service Company except to destroy that Company, which has no other source of hydro-electric supply, and thus strengthen the monopoly at which it aims in both the production and the sale of hydro-electric current produced by the waters of the State.

V.

The writ should be denied.

Respectfully submitted,

JOHN W. DAVIS,
KING, SAPP & KING,
AUBREY L. BROOKS,
Attorneys for Respondent, North Carolina Public Service Company;

C. A. HINES,
Attorney for Respondent, City of Greensboro;

DRED PEACOCK,
Attorney for Respondent, City of High Point.